

**STATE OF MICHIGAN**  
**IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE**

**WELLS FARGO BANK NA,**

**Plaintiff,**

**-v-**

**Case No. 14-016418-CZ**

**NADIR, INC. d/b/a THE LIQUOR BOTTLE  
and NADIR OROW, Jointly and Severally,**

**Hon. Daniel P. Ryan**

14-016418-CZ

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CATHY M. GARRETT

**Defendants.**

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/s/ Michelle Howard

**OPINION**

This matter is before the Court on a Motion for Summary Disposition filed by plaintiff Wells Fargo Bank pursuant to 2.116 (C)(9) and MCR 2.116 (C)(10).<sup>1</sup> For the reasons stated below, this Court will **deny** plaintiff's motion for summary disposition under MCR 2.116 (C) (9), **grant** plaintiff's motion under MCR 2.116 (C) (10) as to defendant Nadir, Inc. and **deny** plaintiff's motion under MCR 2.116 (C) (10) as to defendant Nadir Orow.

**1. Facts and Procedural History**

In this matter, plaintiff Wells Fargo Bank (Wells Fargo) asserts that defendants Nadir, Inc. d/b/a the Liquor Bottle (Nadir, Inc.) and Nadir Orow (Orow) are jointly and severally liable for a debt owed to Wells Fargo in the amount of \$112,203.56. It is alleged that the debt arises out of the use of a Business Line Master Card credit card account issued by Wells Fargo to

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<sup>1</sup> Wells Fargo, in its brief supporting the motion for summary disposition, also claims to rely on MCR 2.116(C)(8), failure to state a claim. This appears to be an oversight by Wells Fargo because it is, in fact, the party who filed the instant claim. In any event, summary disposition would not be proper under section (C) (8) where plaintiff relies on documentary evidence to support its motion for summary disposition. See *Kefgen v Davidson*, 241 Mich App 611,616; 617 NW2d 351 (2000).

Nadir, Inc. According to plaintiff the card was issued “upon express condition that Orow was the personal guarantor for payment.” (Pl’s Brief, 1-2).

Wells Fargo filed a complaint seeking recovery of the \$112,203.56 from defendant Nadir, Inc. and defendant Nadir Orow, as personal guarantor. The complaint alleged that Wells Fargo entered into a contract with defendant Nadir, Inc., that Nadir, Inc. is indebted to Wells Fargo, that the debt has become stated and that defendant Nadir Inc. had also promised, on several occasions, to make payment on the debt. (Pl’s Complaint, paragraphs 5-8). Wells Fargo also alleged defendant Orow had guaranteed the payment and performance of Nadir, Inc. (Pl’s complaint, paragraphs 10-12).

Defendants, in their answer to the complaint, admitted that there was a contract between Wells Fargo and Nadir, Inc., but denied the existence of a stated account and denied that defendant Orow had agreed to guarantee the performance of Nadir, Inc. Defendants stated a number of affirmative defenses, including that there was no accounting given to defendants, there was no written guarantee pled or presented by Wells Fargo, there was no notice of default or demand sent to defendant Orow, and Wells Fargo failed to give the warning required by 15 USC 1601 et seq.

## **2. Standard of Review**

A motion for summary disposition under MCR 2.116(C) (9), for failure to state a valid defense is tested solely by reference to the pleadings. *Nasser v Auto Club Ins Assn*, 435 Mich 33, 47; 457 NW2d 636 (1990). When a material allegation of the complaint is categorically denied, summary disposition pursuant to MCR 2.116(C) (9) is not proper. *Id* at 47-48 quoting *Pontiac School Dist v Bloomfield Twp*, 417 Mich 579, 585; 339 NW2d 465 (1983).

In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the non-moving party. *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The moving party has the initial burden of supporting its position through documentary evidence. *Quito v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party “. . . may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G) (4). If the opposing party fails to do so, the motion for summary disposition is properly granted. MCR 2.116(G) (4); *Quito, supra* at 363.

### **3. Analysis**

#### **A. Summary Disposition under MCR 2.116 (C) (9)**

This Court denies plaintiff’s motion for summary disposition pursuant to MCR 2.116 (C) (9,) as to both defendants. Defendant Nadir, Inc., in its answer to the complaint, denies that it is indebted to plaintiff in the amount of \$112,203.56. Defendant Orow denies that he guaranteed payment and performance by Nadir, Inc. Defendants have also filed affirmative defenses. Where, as here, material allegations of the complaint are categorically denied, summary disposition under MCR 2.116 (C) (9) is not proper. *Nasser, supra* at 47-48.

**B. Summary Disposition under MCR 2.116 (C) (10) as to Defendant Nadir, Inc.**

When examining plaintiff's motion for summary disposition pursuant to MCR 2.116 (C) (10), this court considers the pleadings, admissions and other documentary evidence, in the light most favorable to defendants, to determine if plaintiff is entitled to judgment as a matter of law. *Corely, supra; Maiden, supra*. It is not disputed that there is a contract between plaintiff and Nadir, Inc. See Defendants Answer to Complaint, Paragraph 5. There appears to be no dispute that the terms of the contract are set forth in the Wells Fargo Business Line Customer Agreement (Business Line Agreement) attached to plaintiff's complaint.<sup>2</sup> Pursuant to the Business Line Agreement, the customer "promises to pay Bank, when due, the total of all purchases and advances made on the Account" plus finance and other charges. (Business Line Agreement, p 1). Failure to make a payment, when due, is considered a default under the terms of the agreement. In the event of a default, the plaintiff may, without prior notification, close the account and require immediate payment of the full balance, including finance and other charges. (Business Line Agreement, p 6).

Nadir, Inc. denies that it is indebted to plaintiff, asserting that it was never given an accounting and that plaintiff failed to "comply with or give warnings required by 15 USC 1601 et seq." (Affirmative defenses paragraphs 1 and 6). However, attached to plaintiff's motion for summary disposition are several copies of statements on Nadir, Inc.'s account dating from January 2008 to August 2014. The statements were addressed to "Nadir, Inc., Nadir Orow, 5603 Elmer St, Detroit, MI 48210." Beginning in at least August 2013, the statements contained notice that the account was past due and seriously delinquent. Some amount of payment was

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<sup>2</sup> Defendants have not denied the validity of the customer agreement and have not presented any evidence of a different agreement.

made on the account until April 2014. A statement dated August 13, 2014, indicated a balance of \$112,203.56.

Defendant Nadir, Inc. does not supply any legal authority to support the position that an accounting was required or that the account statements sent by plaintiff were insufficient to set forth the amount due under the agreement. The Business Line Agreement provided that upon default, plaintiff could require payment of the full balance. The full amount due was set forth every month in the account summary provided to Nadir, Inc. There is nothing to indicate that Nadir, Inc. ever challenged the amount owed.<sup>3</sup> Moreover, the mere assertion that an accounting was not given to defendant, is not sufficient to create a genuine issue of material fact.<sup>4</sup> It is up to defendant to set forth specific facts showing an issue for trial and that has not been done in this case. MCR 2.116 (G) (4); *Quito, supra*. The affidavit that defendants claim establish a genuine issue of material fact does not state any specific facts regarding the statements or an accounting, but merely references the claim made in the affirmative defense that no accounting was given to defendants.

Lastly, this Court notes that to the extent defendant Nadir, Inc. claims some sort of notice violation of the Federal Truth in Lending Act (TLA), 15 USC 1601 et seq., it is not a defense to the breach of the agreement in this case. A statutory violation of the TLA does not affect the validity of the underlying contract. See *First Nat'l Bank v Felt*, 368 NW2d 588, 591 (Sup Ct South Dakota, 1985); *Wise Furniture v Dehning*, 343 NW2d 26, 30 (Sup Ct. Minnesota, 1984).

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<sup>3</sup> The statements provided by plaintiff provided a thirty day period in which questions about the statement could be made. Additionally, the last six months of statements contained notice that the account was seriously delinquent and it was “imperative” that defendant contact Well Fargo at the phone number provided. There is no indication that defendant ever did so.

<sup>4</sup> The Court notes that from 2008 to 2014, the account statements were sent to the same address. Payments were made on the statements until early in 2014. Therefore, it appears that the statements were being received.

Based on the foregoing, this Court finds that summary disposition is properly granted with regard to plaintiff's claim against defendant Nadir, Inc.

**C. Summary Disposition under MCR 2.116 (C) (10) as to defendant Nadir Orow**

Plaintiff asserts that defendant Orow, in order to induce plaintiff to enter into the business line agreement, guaranteed Nadir Inc.'s payment and performance under the contract. (Pl's complaint, paragraph 11). In support of its claim for guarantee, plaintiff relies on a transcript of a telephone conversation between a representative of plaintiff and defendant Orow apparently made at the time the Business Line Account was opened. The questions asked by the Wells Fargo representative centered on defendant Orow's income, checking and savings account balances, as well as information regarding the gross sales and bank accounts of Nadir, Inc. (Transcript, pp 2-5).

This Court finds that summary disposition is not proper as to plaintiff's claim against defendant Orow. There is no indication from the transcript provided by plaintiff that Orow had agreed to be a guarantor of any debt owed by Nadir, Inc. The only mention of a guarantee in the telephone conversation came when the representative for plaintiff read back standard language to Orow indicating "this agreement and your guarantee is governed by the laws in California." (Transcript, p 7). This is not sufficient. "[A] personal guarantee cannot be implied from language that fails to clearly and unambiguously reflect an intention to assume such a responsibility." *Bandit Industries, Inc. v Hobbs Inter, Inc*, 463 Mich 504, 514; 620 NW2d 531 (2001). There is nothing in the transcript before this Court that clearly and unambiguously reflects an intention by defendant Orow to personally guarantee the debt of Nadir, Inc.

Even if the transcript showed a clear intention by Orow, summary disposition would not be proper because any contract of guarantee must be in writing. A guarantee/guaranty is "[a]

promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another who is liable in the first instance.” Black’s Law Dictionary (10th Edition). The guarantor’s duty to pay is collateral to the duty of the primary obligor and only arises upon the failure of the obligor to pay the debt. See *Bandit Industries, supra* at 507 n 4. Under the statute of frauds, a promise to answer for the debt of another must be in writing and signed by the party to be charged with the agreement. MCL 566.132 (1) (b).

#### **4. Conclusion**

Based on the foregoing, this Court **denies** plaintiff Wells Fargo’s motion for summary disposition pursuant to MCR 2.116 (C) (9), as to both defendants Nadir, Inc. and Nadir Orow. This Court **grants** Wells Fargo’s motion for summary disposition pursuant to MCR 2.116 (C) (10) as to defendant Nadir, Inc. and **denies** the motion for summary disposition pursuant to MCR (C) (10), as to defendant Nadir Orow.